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Affirmative Action: Congressional and Presidential Activity, 1995-1998

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ABSTRACT

This report reviews and analyzes congressional and presidential activity on affirmative action from 1995 through 1998. It covers the affirmative action-related provisions enacted by the 104th and 105th Congresses, as well as other measures that were considered. It discusses the Clinton Administration's position on affirmative action and its efforts to reform existing programs. Throughout, it identifies events, factors, and considerations that help explain congressional and presidential actions during the 1995-1998 period. The report is intended to be historical and will not be updated. For additional information, see CRS Report 98-992, *Affirmative Action in Employment: Background and Current Debate*, and CRS Report RL30059, *Small Disadvantaged Business Programs of the Federal Government.*

Affirmative Action: Congressional and Presidential Activity, 1995-1998

Summary

Affirmative action emerged as a key issue after the 1994 elections, as critics urged Congress to pass legislation banning racial and gender preferences. Two events appeared to add momentum to this effort. In 1995, the Supreme Court ruled in the case of *Adarand Constructors Inc. v. Pena* that federal affirmative action programs to benefit minorities must meet the stringent "strict scrutiny" standard. The following year, voters in California approved Proposition 209, a controversial ballot initiative that banned race- and gender-based preferential treatment in state programs.

The 104th Congress considered various measures to curtail affirmative action, including companion bills (H.R. 2128, S. 1085) to broadly ban preferences in federal contracting, federal employment, and federally conducted programs. None of the bills that dealt primarily with affirmative action, including these two, were reported out by a full committee. The 104th Congress eliminated two specific provisions benefitting disadvantaged businesses. It repealed a Federal Communications Commission program that gave tax breaks to companies selling broadcast companies to minority-owned businesses, and did not renew a provision setting a 10% goal for the Agency for International Development to contract with minorities and women.

Much of the affirmative action-related legislation considered in the 105th Congress sought to curb or eliminate federal programs to assist small disadvantaged businesses. A provision to place limits on the Defense Department's disadvantaged business program was enacted. Broad bills to ban federal preferences (H.R. 1909, S. 950) were again introduced, but neither was reported out by a full Committee.

From 1995 through 1998, the Clinton Administration followed a "mend it, but don't end it" approach to affirmative action. In 1995, it initiated a review of federal race-conscious programs to ensure compliance with *Adarand*, which resulted in the modification or elimination of various programs. In 1996, the Administration began the process of reforming affirmative action in federal procurement. Final rules issued in 1998 placed limits on the use of race-conscious procurement measures. It remains to be seen whether these revised programs will withstand constitutional challenge.

Assessments of the impact of congressional and presidential activity on affirmative action during the 1995-1998 period varied widely. Supporters of efforts to assist minorities and women maintained that the changes made to federal affirmative action programs greatly reduced opportunities, while opponents of preferences characterized the reforms as minor. These opponents had hopes in early 1995 that Congress would act to broadly ban race- and gender-based preferential treatment. Neither the 104th nor the 105th Congress took up such legislation, however, likely due to a lack of consensus about how to address the affirmative action issue and competing legislative priorities, among other factors.

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Introduction

Following the November 1994 elections, in which Republicans gained control of both the House and the Senate, affirmative action emerged as a key legislative issue. Longstanding opponents and more recent critics looked to Congress to eliminate or modify programs that granted preferential treatment to minorities and women. They argued variously that such programs were unconstitutional, unfair, and harmful. The Supreme Court appeared to bolster their cause when, in June 1995, it handed down its decision in *Adarand Constructors Inc. v. Pena*. In the *Adarand* case, the Court ruled that federal affirmative action programs to benefit minorities must meet the same "strict scrutiny" standard that applies to state and local programs. To survive strict scrutiny, federal programs must serve a compelling governmental interest and must be narrowly tailored to meet that interest. Previously, the Court had subjected congressionally mandated affirmative action to a lesser standard of review in light of Congress's broad authority to enforce equal protection guarantees.

A second event that some thought might create momentum for congressional activity on affirmative action was California's approval of Proposition 209 in November 1996. Proposition 209 was a controversial ballot initiative to ban race- and gender-based preferential treatment in state employment, contracting, and college admissions. Affirmative action critics urged Congress to enact similar legislation at the federal level.

Bills to eliminate, or effectively limit, certain types of affirmative action or particular affirmative action programs were introduced in both the 104th and 105th Congresses. As detailed in this report, however, most of these measures went no further than committee referral. None of the bills that dealt primarily with affirmative action or preferences were reported out by a full committee, and with one exception, no affirmative action-related floor amendments were adopted in either chamber. The only provisions curtailing affirmative action that were enacted concerned particular programs and were parts of larger bills. For the most part, these provisions did not receive much public attention.

President Clinton opposed congressional efforts to dismantle affirmative action programs. Instead, he advocated a "mend it, but don't end it" approach, endorsing the underlying principles of affirmative action and vowing to correct any unfair or improper practices. The President seemed to see this approach as consistent with the *Adarand* decision. During a July 1995 address, he characterized the ruling, as follows: "While setting stricter standards to mandate reform of affirmative action, it

[*Adarand*] actually reaffirmed the need for affirmative action ...."[1] President Clinton directed federal agencies to review their affirmative action programs for compliance with *Adarand,* and to reform or eliminate particular programs, as necessary. Since 1995, the Administration has modified or terminated a number of affirmative action practices and programs, particularly in the area of federal procurement.

Background

The U.S. Commission on Civil Rights has defined affirmative action to encompass "any measure, beyond simple termination of a discriminatory practice, adopted to correct or compensate for past or present discrimination or to prevent discrimination from recurring in the future."[2] Affirmative action operates in various areas including employment, public contracting, education, and housing. In recent years, congressional and presidential attention has been focused mainly on employment and contracting programs.

Affirmative action in employment dates to the 1960s. Title VII of the Civil Rights Act of 1964, as amended,[3] prohibits discrimination by private employers on the basis of race, color, religion, sex, or national origin. Under Title VII, a court that finds that an employer has intentionally engaged in discrimination can order affirmative action remedies. Executive orders issued in the 1960s, including Executive Order 11246,[4] require federal government contractors to take affirmative action toward employees and applicants for employment in areas such as recruitment, employment, and promotion. Regulations issued by the Nixon Administration in 1970 and revised in 1971 require larger federal contractors to develop written affirmative action plans that include goals and timetables. In the early 1970s, federal agencies were authorized, though not required, to use employment goals and timetables.[5]

In the contracting area, there are a number of federal programs that support the development of small disadvantaged businesses (SDBs). The Small Business Act, as amended,[6] defines SDBs as small businesses owned and controlled by socially and economically disadvantaged individuals. African Americans, Hispanic Americans,

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[1] Address by President Clinton on Affirmative Action, July 19, 1995. In Remarks of Edward Kennedy. *Congressional Record*, Daily Edition, v. 141, July 19, 1995. p. S10308.

[2] U.S. Commission on Civil Rights. *Statement on Affirmative Action*. Washington, 1977. p. 2.

[3] P.L. 88-352, July 2, 1964; 78 Stat. 241, 253. Title VII is codified at 42 U.S.C. 2000e *et seq.*

[4] U.S. President (L. Johnson). Executive Order 11246, Reassignment of Civil Rights Functions, September 24, 1965. *Weekly Compilation of Presidential Documents*, v. 1, September 27, 1965. p. 305.

[5] For additional information on affirmative action in employment, see CRS Report 98-992, *Affirmative Action in Employment: Background and Current Debate*, by Andorra Bruno.

[6] 15 U.S.C. 631 *et seq.*

Asian Americans, and Native Americans are presumed to be socially disadvantaged. Others may establish their disadvantaged status for participation in some programs. Prominent among the federal programs to assist SDBs is the Small Business Administration's 8(a) program. Under the 8(a) program, the Small Business Administration enters into procurement contracts with other federal agencies and then subcontracts the work to the limited number of SDBs certified for participation in the program. All federal agencies with procurement authority are required to set annual percentage goals for contracting with SDBs. The specific goals for some agencies, including the Defense Department and the Transportation Department, are established by statute.[7]

Actions of the 104th Congress

Following the 1994 elections, opponents of racial and gender preferences urged the new Congress to pass legislation banning preferential treatment. While the 104th Congress did not enact the type of comprehensive ban favored by many critics, it did eliminate two specific provisions benefitting disadvantaged businesses. Early in the first session, in February 1995, a bill was introduced to amend the Internal Revenue Code (H.R. 831). It contained language repealing a Federal Communications Commission (FCC) program intended to encourage minority ownership of broadcast companies. The FCC program allowed companies selling broadcast stations or cable television systems to minority-owned businesses to defer capital gains taxes. In some major deals, this tax break amounted to hundreds of millions of dollars. A separate provision of H.R. 831 sought to make permanent a tax deduction for self-employed individuals who buy their own health insurance. Under the terms of the bill, savings from the repeal of the FCC tax break would help finance the health insurance deduction. During House consideration of the measure, a compromise amendment was offered that would have retained, but limited, the tax break. It was rejected. The conference report agreed to by the House and Senate contained the repeal provision. Citing the health insurance tax deduction, President Clinton signed H.R. 831 into law in April 1995.[8]

The second affirmative action-related provision eliminated by the 104th Congress established a contracting goal for the Agency for International Development (AID). The provision, which had been part of the foreign operations appropriations bill, directed AID to award at least 10% of its development assistance funding to businesses owned and controlled by socially and economically disadvantaged individuals or other disadvantaged entities. This contracting goal, which benefitted both minorities and women, was first enacted as part of the FY1984 continuing resolution.[9] Known as the Gray Amendment after former Representative William Gray, the provision was renewed each fiscal year through FY1995. The 104th

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[7] For additional information on affirmative action in federal contracting, see CRS Report RL30059, *Small Disadvantaged Business Programs of the Federal Government*, by Mark Eddy. (Hereinafter cited as CRS Report RL30059)

[8] P.L. 104-7, April 11, 1995; 109 Stat. 93.

[9] P.L. 98-151, Nov. 14, 1983; 97 Stat. 964, 970.

Congress, however, did not include it in the FY1996 foreign operations appropriations bill, which was signed into law in February 1996.

Congressional critics of affirmative action introduced other bills and amendments to eliminate, or effectively limit, certain types of affirmative action or particular preference programs, but none were enacted. In the Senate, there were efforts to curb affirmative action through the appropriations process. In July 1995, Senator Phil Gramm offered an amendment (S.Amdt. 1825) to the FY1996 legislative branch appropriations bill (H.R. 1854) to prohibit agencies funded by the bill from awarding federal contracts on the basis of race, color, national origin, or gender. No other Senator spoke on the floor in favor of the amendment, and it was rejected by a vote of 36 to 61. Floor remarks by Senator Pete Domenici suggested that at least some Senators may have voted primarily against the process being used to enact the measure. According to Senator Domenici:

> There is no question that this is an important issue — discrimination. And to come to the floor on an appropriations bill, no public hearings that I know of, no committee hearings that I am aware of, and to suggest that on each appropriations bill we are going to tailor some way to get rid of affirmative action in the United States, in my opinion, is as apt to miss the point as it is to solve anything.[10]

Following the defeat of the Gramm amendment, the Senate approved, 84 to 13, a substitute amendment (S.Amdt. 1826) introduced by Senator Patty Murray, which incorporated standards for federal affirmative action programs endorsed by President Clinton. The Murray amendment barred the use of funds made available by the legislative branch appropriations act for programs that result in the awarding of federal contracts to unqualified persons, in reverse discrimination, or in quotas, or for programs inconsistent with the Supreme Court's decision in the *Adarand* case.

The FY1996 appropriations bill for the Commerce, Justice, and State Departments (H.R. 2076), as reported by the Senate Appropriations Committee, contained various provisions to curtail affirmative action. The bill would have barred agencies covered by the measure from using appropriated funds for certain types of affirmative action programs. (The disallowed programs were those that would have been banned under Senator Dole's anti-preference bill, discussed below.) In the contracting area, the bill would have changed the criteria for participation in the Small Business Administration's 8(a) program. It would have required that participating small businesses be located in economically distressed areas. These affirmative action provisions were eliminated from the bill on the Senate floor by unanimous consent.

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[10] Domenici, Pete. Remarks in the Senate. *Congressional Record*, Daily Edition, v. 141, July 20, 1995. p. S10413.

Dole-Canady Bills

Despite expectations that a comprehensive, stand-alone bill to dismantle federal affirmative action programs would be offered early in the first session, it was not until July 1995 that Senate Majority Leader Bob Dole and Representative Charles Canady introduced the Equal Opportunity Act of 1995 (S. 1085, H.R. 2128). The Dole-Canady bills sought to bar the federal government from intentionally discriminating against, or granting a preference to, any individual or group based on race, color, national origin, or sex, in federal contracting, federal employment, or federally conducted programs. The bills would also have prohibited the government from requiring or encouraging federal contractors to grant such preferences. Preferences were defined in the legislation to include quotas, set-asides, numerical goals, timetables, and other numerical objectives. S. 1085 was referred to the Senate Labor and Human Resources Committee. H.R. 2128 was referred to several committees, including the House Judiciary Committee and the House Economic and Educational Opportunities Committee.

No action occurred on S. 1085 or H.R. 2128 during the first session, except for House hearings on the latter bill by the Constitution Subcommittee of the Judiciary Committee. One factor contributing to the delay in acting on these bills, and the affirmative action issue generally, was the view stated by Speaker Newt Gingrich and others that before banning preferences, Congress should develop a positive, race-neutral program to increase opportunities for disadvantaged individuals and communities. A House task force, chaired by Representatives J.C. Watts and James Talent, was charged with developing such a program. The resulting bill (H.R. 3467), which contained initiatives designed to stimulate job creation and revitalize poor communities, was introduced by Representative Watts in May 1996.[11]

H.R. 2128 and S. 1085 did receive limited committee consideration during the second session. The Employer-Employee Relations Subcommittee of the House Economic and Educational Opportunities Committee held a broad hearing on affirmative action in employment, which included discussion of the House bill. In March 1996, the Constitution Subcommittee marked up H.R. 2128, voting along party lines to approve the bill, as amended. During the following months, as support for a comprehensive bill waned, Representative Canady prepared a scaled-down version of H.R. 2128 to offer as a substitute at the Judiciary Committee markup scheduled for July. The substitute would have banned preferences only in federal contracting. The Judiciary Committee had a crowded markup agenda, however, and never took up H.R. 2128. The bill died at the end of the Congress. S. 1085 was the subject of one hearing in 1996 by the Senate Labor and Human Resources Committee, but saw no further action.

A separate bill to restrict affirmative action in federal procurement, which was narrower than the revised Canady bill, received some attention toward the end of the Congress. The Entrepreneur Development Program Act of 1996 (H.R. 3994), introduced by Representative Jan Meyers in August 1996, would have eliminated the

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[11] Hearings on H.R. 3467 were held in July 1996, but no further action on the bill occurred.

8(a) program, and would have created a new, race-neutral program to provide business development assistance to "emerging small businesses." The Small Business Committee held a hearing on the measure in September 1996, but did not report out the bill.

The other affirmative action-related bills introduced in the 104th Congress saw no action beyond committee referral or placement on the Senate legislative calendar. Among these bills were measures to amend Title VII of the Civil Rights Act of 1964 to make it an unlawful employment practice to grant preferential treatment on the basis of race, color, religion, sex, or national origin (S. 26, S. 318), and to prohibit federal agencies from requiring or encouraging preferences based on race, sex, or ethnic origin, in connection with federal contracts (H.R. 3190). Also introduced were broader bills to ban preferential treatment, modeled, in part, on the anti-preference Proposition 209 approved by California voters in November 1996. These bills included measures to prohibit the federal government from using race, color, gender, ethnicity, or national origin as a basis for granting preferential treatment in the provision of public employment, public contracts, or federal benefits (S. 497, H.R. 1764), and to make it unlawful to use race, sex, color, ethnicity, or national origin as a criterion for granting preferential treatment in employment, education, or contracting (H.R. 1840).

Actions of the 105th Congress

Federal programs to assist small disadvantaged businesses were the subject of much of the affirmative action-related legislation considered in the 105th Congress, including the one provision that was enacted. That provision, which was part of the FY1999 defense authorization bill (H.R. 3616), placed limits on the Defense Department's SDB program. The Defense Department has a statutory goal of awarding 5% of the total value of its procurement contracts to SDBs in each fiscal year. By law, however, it may not enter into a contract with an SDB for a price exceeding fair market cost by more than 10%. Under the regulations in effect at the time of congressional consideration of H.R. 3616, the department could give SDBs a price evaluation preference of up to 10% when they were competing for contracts with non-SDBs.

Section 801 of the conference report on H.R. 3616 sought to amend current law to require that the Defense secretary determine, at the beginning of each fiscal year, whether the department had met its 5% SDB goal in the most recent fiscal year for which data were available. If the goal had been met, the secretary would be required to suspend, for 1 year, the regulations providing for the granting of price evaluation preferences to SDBs. During that 1-year period, the secretary would be prohibited from entering into a contract with an SDB for a price exceeding fair market cost. Section 801 was similar to a provision (Section 803) in the FY1999 defense authorization bill passed by the Senate in June 1998 (S. 2057). The Defense Department has exceeded its 5% goal in every year since FY1992. Following House

and Senate approval of the conference report, the President signed the measure into law.[12]

The Department of Transportation's disadvantaged business enterprises (DBE) program was targeted for elimination during House and Senate floor debate on bills to reauthorize the Intermodal Surface Transportation Efficiency Act (ISTEA). In March 1998, Senator Mitch McConnell proposed an amendment (S.Amdt. 1708) to the Senate reauthorization bill (S. 1173) to strike the language reauthorizing the DBE program. The DBE provision in ISTEA required that not less than 10% of federal transportation funds be expended with disadvantaged businesses, which included women-owned enterprises, except to the extent that the Transportation secretary determined otherwise. In place of the DBE program, S.Amdt. 1708 would have established a race-neutral Emerging Business Enterprise program. This program would have required states to engage in outreach to small businesses in the construction industry and to provide them with technical services and assistance. The Senate voted, 58 to 37, to table the McConnell amendment.

In the House, Representative Marge Roukema offered a floor amendment (H.Amdt. 548) to the House transportation reauthorization bill (H.R. 2400) in April 1998 to strike the section of the bill reauthorizing the DBE program. In its place, the amendment would have added language encouraging affirmative action in the form of outreach and recruitment, but prohibiting race- or gender-based preferential treatment, in connection with transportation contracts. The House rejected H.Amdt. 548 by a vote of 225 to 194. The Transportation Equity Act for the 21st Century, as signed into law, contained a provision reauthorizing the DBE program.[13]

During Senate consideration of its FY1999 transportation appropriations bill (S. 2307) in July 1998, Senator McConnell proposed another floor amendment (S.Amdt. 3326) concerning the DBE program. The amendment, which, he argued, was necessary in light of the *Adarand* decision, sought to provide for expedited judicial review of any claim challenging the constitutionality of the DBE program. The amendment was agreed to by voice vote, and the Senate passed S. 2307, as amended. The Senate then took up the House-passed FY1999 transportation appropriations bill (H.R. 4328). In accordance with a unanimous consent agreement, the text of S. 2307 was substituted for the text of H.R. 4328, and the bill was passed. (The judicial review provision was Section 349 of H.R. 4328, as passed by the Senate.) H.R. 4328

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[12] P.L. 105-261, October 17, 1998. The Defense Department has since suspended its use of price evaluation preferences, in accordance with the law.

[13] P.L. 105-178, Section 1101(b), June 9, 1998. A new rule issued by the Transportation Department in February 1999, however, scaled back the DBE program. The rule stated that DOT's 10% statutory goal for DBE contracting was an aspirational goal that applied at the national level. Revised regulations directed communities receiving financial assistance from DOT to establish their own overall DBE goals based on the availability of DBEs able to participate on DOT-assisted contracts. The final rule can be found at: U.S. Dept. of Transportation. Participation by Disadvantaged Business Enterprises in Department of Transportation Programs. *Federal Register*, v. 64, no. 21, February 2, 1999. p. 5095-5148. Other changes to affirmative action programs made by the Clinton Administration are discussed in the next section.

became the FY1999 Omnibus Appropriations bill, which included appropriations for the Transportation Department. The judicial review provision was deleted in conference and, thus, was not part of the final version of H.R. 4328 signed into law.

Opponents of preferences also attempted to curtail affirmative action in education, by offering amendments during May 1998 House debate on a bill (H.R. 6) to reauthorize programs under the Higher Education Act of 1965. Representative Frank Riggs offered an amendment (H.Amdt. 612) to prohibit public colleges and universities that participate in programs authorized by the 1965 act from granting preferential treatment in admissions based on race, sex, color, ethnicity, or national origin. H.Amdt. 612 was defeated by a vote of 249 to 171. An amendment by Representative Tom Campbell (H.Amdt. 613) would have prohibited the exclusion of any individual from any authorized program or activity on the basis of race or religion. H.Amdt. 613 was rejected on a 227-189 vote.

As he had in the 104th Congress, Representative Canady sponsored a broad bill to prohibit the federal government from granting a preference to any individual or group based on race, color, national origin, or sex, in federal contracting, federal employment, or federally conducted programs (H.R. 1909). Introduced in June 1997, the Civil Rights Act of 1997 was substantively similar to his 1995 measure. H.R. 1909 was referred to several committees, including the House Judiciary Committee. That committee's Constitution Subcommittee held a hearing on H.R. 1909 and then a markup, at which the bill was approved by voice vote. In November 1997, right before adjournment, the Judiciary Committee met to mark up H.R. 1909. A motion to table the bill was offered and was approved by a vote of 17 to 9. Some committee members opposed to preferences said they had voted to table the bill because they did not think it advisable to act on such a controversial issue at the end of the session. There were reports that a revised version of H.R. 1909 would be offered in 1998, but no such bill was introduced.

Senator McConnell introduced the companion bill (S. 950) to H.R. 1909 in June 1997. It was placed on the calendar. He also introduced a second bill (S. 952) containing some of the provisions of S. 950, which was referred to the Judiciary Committee. No further action was taken on either measure.

Among the other affirmative action-related measures before the 105th Congress was a bill (H.R. 3330) concerning college admissions introduced by Representative Riggs. Similar to the amendment he offered to the Higher Education Act, H.R. 3330 would have prohibited institutions of higher education that participate in programs authorized under the act from granting preferential treatment in admissions on the basis of race, sex, color, ethnicity, or national origin. Also introduced were bills to amend Title VII of the 1964 Civil Rights Act to make it an unlawful employment practice to grant preferential treatment on the basis of race, color, religion, sex, or national origin (S. 46, S. 188), and to require the implementation of an alternative program whenever a federal program granting a benefit or preference based on race, gender, or national origin is invalidated by a court (H.R. 2079). No action beyond committee referral or placement on the Senate calendar occurred on any of these bills.

Actions of the Clinton Administration

During its first 2 years, the Clinton Administration had shown support for affirmative action and had not been seriously challenged on the issue. Following the 1994 congressional elections, however, it faced a growing effort to eliminate racial and gender preferences. The President responded in February 1995 by ordering a White House review of all federal affirmative action programs. At a news conference the following month, he summarized the purpose of the review:

> I want to know what these [affirmative action] programs are exactly, I want to know whether they are working, I want to know whether there is some other way we can reach any objective without giving a preference by race or gender in some of these programs.[14]

During the final stages of the White House study, the Supreme Court issued its decision in *Adarand Constructors Inc. v. Pena*, a case concerning a Transportation Department subcontracting program. The Court ruled in *Adarand* that federal affirmative action programs based on race or ethnicity must satisfy the "strict scrutiny" standard. This standard requires that such programs be narrowly tailored to serve a compelling governmental interest.[15] Shortly after the Court issued its ruling, the Justice Department sent a memorandum to federal agencies providing preliminary legal guidance on the decision. The memorandum explained that the holding in *Adarand* was not limited to federal contracting and that courts would apply the strict scrutiny standard "in reviewing the federal government's use of race-based criteria in health, education, hiring, and other programs."[16]

In a July 1995 address, President Clinton discussed the results of the White House study and the *Adarand* decision.[17] "This review concluded," he said, "that affirmative action remains a useful tool for widening economic and educational opportunity."[18] According to President Clinton, "When affirmative action is done right, it is flexible, it is fair, and it works."[19] At the same time, the President

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[14] Excerpts from President Clinton's News Conference. *Washington Post*, March 4, 1995. p. A8.

[15] For legal analysis of the *Adarand* decision, see CRS Report 97-665, *Minority and Small Disadvantaged Business Contracting: Legal and Constitutional Developments*, by Charles V. Dale.

[16] Dellinger, Walter, Assistant Attorney General, U.S. Department of Justice. *Adarand*, memorandum to general counsels, June 28, 1995. p. 1 (on file with author).

[17] Many observers believed that the Administration had waited for the Supreme Court to hand down its *Adarand* ruling, and thereby provide guidance on the affirmative action issue, before completing its review and finalizing its conclusions. For the text of the President's speech, see Address by President Clinton on Affirmative Action, July 19, 1995. In Remarks of Edward Kennedy. *Congressional Record*, Daily Edition, v. 141, July 19, 1995. p. S10306-S10309.

[18] Ibid., p. S10308.

[19] Ibid., p. S10307.

acknowledged that "affirmative action has not always been perfect" and "should not go on forever."[20]

On the subject of *Adarand*, the President emphasized that the ruling did not dismantle affirmative action or set-asides. Rather, he argued, "it actually reaffirmed the need for affirmative action," while "setting stricter standards to mandate reform."[21] During the address, President Clinton announced that he was directing federal agencies to comply with the *Adarand* decision. He also instructed agencies to apply the following four standards to all affirmative action programs: "No quotas in theory or practice; no illegal discrimination of any kind, including reverse discrimination; no preference for people who are not qualified for any job or other opportunity; and as soon as a program has succeeded, it must be retired."[22] The President called for the elimination or reform of any program not meeting these standards.

In July 1995, the Justice Department began working with federal agencies to review their race-conscious programs for compliance with *Adarand*. According to the Justice Department, over the course of the review it directed agencies to terminate or modify a number of contracting practices and other programs.[23] In a notable early termination, the Defense Department suspended a contracting rule known as the "rule of two" in October 1995. The department, which conducts the majority of all federal procurement, had adopted the rule to implement its statutory authority to "enter into contracts using less than full and open competitive procedures" in order to achieve its SDB contracting goal.[24] Under the rule of two, contracts are set aside for small disadvantaged businesses "when there is a reasonable expectation" that at least two such firms qualified to perform the work will offer bids; other conditions also apply.[25] Set-aside authority had been extended to all federal agencies by the Federal Acquisition Streamlining Act (FASA) of 1994,[26] but after *Adarand*, the proposed rules to implement it were never issued in final form.

In February 1996, the Justice Department issued a memorandum to federal agencies addressing the application of "strict scrutiny" to affirmative action in federal employment. The memorandum stated that "the application of strict scrutiny should

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[20] Ibid., p. S10309

[21] Ibid., p. S10308.

[22] Ibid., p. S10309

[23] See Fisher, Raymond C., Associate Attorney General, U.S. Department of Justice, letter to Honorable Charles Canady, Chairman, House Subcommittee on the Constitution, February 24, 1998 (on file with author). Also see Holmes, Steven A. Administration Cuts Affirmative Action While Defending It. *New York Times*, Washington ed., March 16, 1998. p. A17.

[24] 10 U.S.C. 2323(e)(3).

[25] 48 C.F.R. 219.502-2-70.

[26] P.L. 103-355, Section 7102, October 13, 1994; 108 Stat. 3243, 3367; 15 U.S.C. 644 note.

not require major modifications in the way federal agencies have been properly implementing affirmative action policies" and set forth guidelines for such policies.[27]

Federal Procurement Reform

The Justice Department proposed new rules for the use of affirmative action in federal procurement in May 1996.[28] The reform proposal, which was subsequently modified in response to public comment,[29] was designed to ensure compliance with *Adarand*. The department maintained that, as required by the *Adarand* ruling, the federal government had a compelling interest in counteracting the ongoing effects of discrimination in federal contracting through affirmative action. To meet the accompanying narrow tailoring requirement, the department proposed to place limits on the use of race-conscious procurement measures. The limits would take the form of benchmarks, which would be established for each industry by the Commerce Department. They would represent the level of minority contracting to be expected in the absence of discrimination. Under the proposal, the benchmarks would be compared to the actual level of minority participation in each industry. Race-conscious contracting mechanisms, such as the SBA's 8(a) program and a bidding credit (price evaluation adjustment) for SDB contractors,[30] would be permitted in industries in which actual participation fell below the applicable benchmarks.[31]

The Justice Department believed that its proposed system would make it unnecessary for agencies to use their authority under FASA to set contracts aside for bidding exclusively by SDBs. Its May 1996 proposal had called for revisiting this issue after 2 years. In response to concerns about a 2-year set-aside moratorium, however, the Justice Department modified its proposal to allow agencies to invoke their set-aside authority in an industry at any time, if there were strong evidence that the reformed system was incapable of remedying a significant underutilization of minority contractors in that industry.[32]

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[27] Schmidt, John R., Associate Attorney General, U.S. Department of Justice. *Post-*Adarand *Guidance on Affirmative Action in Federal Employment*, memorandum to general counsels, February 29, 1996. p. 18 (on file with author).

[28] See U.S. Dept. of Justice. Proposed Reforms to Affirmative Action in Federal Procurement. *Federal Register*, v. 61, no. 101, May 23, 1996. p. 26041-26063.

[29] See U.S. Dept. of Justice. Response to Comments to Department of Justice Proposed Reforms to Affirmative Action in Federal Procurement. *Federal Register*, v. 62, no. 90, May 9, 1997. p. 25648-25653.

[30] In addition to authorizing contract set-asides as noted above, Section 7102 of FASA had granted federal agencies the authority to give price evaluation preferences to SDBs in competitive procurements (108 Stat. 3367). This authority had not been implemented previously.

[31] For a more detailed discussion of benchmarking, see CRS Report RL30059, p. 11.

[32] See Response to Comments to Department of Justice Proposed Reforms to Affirmative Action in Federal Procurement, p. 25651.

Rules to implement the Justice Department's reform proposal were issued by the relevant agencies in 1998. On June 30 and July 1, the Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration published interim rules to amend the Federal Acquisition Regulation (FAR) concerning programs for SDBs.[33] The June 30 rule established in the FAR a price evaluation adjustment of up to 10% for SDBs. A notice published the same day by the Office of Federal Procurement Policy within the Office of Management and Budget identified the industries eligible for a 10% price evaluation adjustment, based on a Commerce Department analysis.[34] Also on June 30, the Small Business Administration published final rules to amend regulations governing the 8(a) program and other regulations concerning SDBs.[35] Among the changes to the 8(a) program, the revised regulations make it easier for non-minorities to demonstrate social disadvantage, a requirement for admission to the program.[36] It remains to be seen whether these revised procurement programs will withstand court challenge.

Conclusion

At the end of 1998, assessments of the impact of congressional and presidential activity on affirmative action during the past four years varied widely. Supporters of programs to assist minorities and women maintained that the changes significantly reduced opportunities, particularly for minority-owned businesses. While some of these advocates believed that the reforms were necessary to protect the programs against constitutional challenges, others contended that the changes went beyond the requirements of *Adarand*. For their part, opponents of preferences characterized the reforms as minor, arguing that the federal system of race-based decisionmaking remained largely intact. Why hadn't Congress acted on legislation to ban federal preferential treatment, as they had urged? In retrospect, the *Adarand* ruling and the passage of Proposition 209 may have decreased, rather than increased, the chances for congressional action, by suggesting that preferential programs would be dismantled by the courts and the states. Lack of consensus about how to address the affirmative action issue and competing legislative priorities, as well as the absence of broad-based public pressure to act, may also have been important factors.

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[33] See U.S. Dept. of Defense, General Services Administration, and National Aeronautics and Space Administration. Federal Acquisition Regulation; Reform of Affirmative Action in Federal Procurement. *Federal Register*, v. 63, no. 125, June 30, 1998. p. 35719-35726; no. 126, July 1, 1998. p. 36119-36127.

[34] See U.S. Office of Management and Budget. Small Disadvantaged Business Procurement; Reform of Affirmative Action in Federal Procurement. *Federal Register*, v. 63, no. 125, June 30, 1998. p. 35714-35718.

[35] See U.S. Small Business Administration. Small Business Size Regulations; 8(a) Business Development/Small Disadvantaged Business Status Determinations;... *Federal Register*, v. 63, no. 125, June 30, 1998. p. 35726-35767; U.S. Small Business Administration. 8(a) Business Development/Small Disadvantaged Business Status Determinations. *Federal Register*, v. 63, no. 125, June 30, 1998. p. 35767-35780.

[36] See Ibid., p. 35727-35728. For additional information on the 8(a) program, as revised by the new regulations, see CRS Report RL30059, p. 12-13.